

In the Matter of Mark Hingston, County of Monmouth
DOP Docket No. 2004-2985
(Merit System Board, decided August 11, 2004)

Mark Hingston, a County Correction Officer with Monmouth County, represented by John J. Sheehy, Esq., seeks Merit System Board (Board) resolution of a dispute concerning back pay. The appellant also requests counsel fees.

As background, the appellant was indefinitely suspended from employment, effective November 13, 2000, after being indicted on charges of theft from PBA Local 240. In June 2003, the appellant was tried and found not guilty of the charges. Thereafter, the appellant returned to duty on June 23, 2003. The parties attempted to settle the amount of back pay due to the appellant, but after discussions reached an impasse, the appellant requested Merit System Board (Board) review. *See N.J.A.C. 4A:2-2.10*. It is noted that the parties have agreed that in the year 2000, the appellant's annual salary was \$52,000; in 2001 his annual salary would have been \$56,000; in 2002 his annual salary would have been \$60,000; and in 2003 his annual salary would have been \$62,500.

The appellant submits proposed calculations concerning the gross amount of back pay owed to him. In this regard, the appellant states that from November 13, 2000 until June 23, 2003, he would have earned a total of \$154,452. Specifically, the appellant asserts that from November 13, 2000 through December 31, 2000 he would be entitled to \$6,000; his annual salary for 2001 and 2002; and for the 27 weeks from January 1, 2003 until June 23, 2003 he would be entitled to \$32,452. The appellant calculated the per diem rate by dividing the annual salary for 2003 (\$62,500) by 260 (the number of workdays within a year). The appellant claims that he is entitled to a total back pay award of **\$83,630**, which is the difference between what he asserts he would have received as a County Correction Officer¹ and what he actually earned. The appellant submits an affidavit of mitigation as to his back pay award and provides copies of his 2000, 2001 and 2002 federal Income Tax returns which indicates he earned the following amounts.

¹ The appellant calculated this total by utilizing his total annual salaries for 2000, 2001 and 2002 and \$32,452 for 2003. However, although the appellant agrees his annual salary for 2000 was \$52,000 and 2001 was \$56,000, he utilized the incorrect amounts of \$56,000 for 2000 and \$58,000 for 2001.

YEAR	AMOUNT EARNED	SOURCE
2000	\$54,250	As a County Correction Officer until his indefinite suspension (earned prior to indefinite suspension)
	\$2,042	As a Commissioner with Berkeley Township Municipal Utilities Authority ²
	\$90	W.L. Goodfellas
2001	\$33,275	Aramark
	\$10	County Treasurer
	\$2,298	Home Depot
	\$9,734	Self-employed as a landscaper
2002	\$216	Work at a Recreation Center
	\$20,245	Self-employed as a landscaper
2003	\$662	Self-employed as a landscaper through June 30, 2003
	\$122,822	TOTAL

In addition to his back pay award, the appellant seeks counsel fees in the amount of \$30,000, for work done in connection with his criminal defense since he was clearly inappropriately charged. Moreover, the appellant maintains that his co-defendant was provided with “full benefits and back pay” without any questions asked regarding his mitigation. Therefore, the appellant argues that the appointing authority’s failure to provide him with the \$83,630 in back pay clearly demonstrates the appointing authority’s animus for him.

In response, the appointing authority, represented by Robert J. Hrebek, Assistant County Counsel, submits proposed calculations concerning the gross amount of back pay owed to the appellant. In this regard, the appointing authority states that from November 13, 2000 until June 23, 2003, the appellant would have earned a total of \$152,567. Specifically, it asserts that from November 13, 2000 through December 31, 2000 he would be entitled to \$7,000 for 35 days; his annual salary for 2001 and 2002; and from January 1, 2003 until June 23, 2003, he would be entitled to \$29,567 for 123 days. The appointing authority calculated the per diem rate by dividing the annual salary for 2000 (\$52,000) and 2003 (\$62,500) by 260 (the number of

² The appellant indicates he resigned after being “paraded through the criminal justice system.”

workdays within a year). With regard to mitigation, the appointing authority acknowledges the figures provided by the appellant. However, the appointing authority submits several alternative arguments as to the proper back pay calculation. First, the appointing authority maintains that the appellant is only entitled to **\$10,213** in back pay since the appellant quit his positions with Aramark and Home Depot. Specifically, the appointing authority notes that the appellant maintained that he quit Aramark, effective September 16, 2001, to start his own landscaping business. The appointing authority argues that by voluntarily quitting Aramark and Home Depot, the appellant took himself off of the job market, and is therefore not entitled to any additional back pay after September 16, 2001.

In the alternative, the appointing authority argues that since the appellant voluntarily quit Aramark and Home Depot, the earnings he could have earned while still employed with those companies should be attributed to him for each of the relevant years. The appointing authority notes that if the appellant had remained at Aramark, he would have earned \$42,032 for the entire year of 2001. Therefore, that amount should be attributed to him for 2002 and 2003. Moreover, the appointing authority argues that the \$2,298 the appellant earned at Home Depot should also be attributed to him for 2002 and 2003 since he voluntarily quit. Consequently, the appointing authority maintains that if the full salaries from Aramark and Home Depot are attributed to the appellant for 2001 and 2002, and a half-year of salary of each is attributed to him for 2003, then he would be due **\$39,610** in back pay.

The appointing authority also argues alternatively that the appellant's gross income from self-employment should be deducted from his claim of mitigation rather than his net income. Specifically, the appointing authority argues that it is unfair to allow the appellant to "retain the value of [start-up] costs, new trucks and equipment and such, at the expense of the public." The appointing authority asserts that if the appellant's gross income is taken into account, then the appellant earned \$42,285 in 2001; \$80,037 in 2002; and \$40,016 in 2003, and therefore, he would not be entitled to any back pay.

In response, the appellant maintains that it was "impossible" for him to apply for work in Monmouth and Ocean Counties due to his arrest and the resulting newspaper articles. With regard to Aramark, the appellant initially indicates that he quit in order to start his own landscaping business. However, the appellant later indicates that he quit his employment with Aramark because he did not get along with his supervisor and he had already started his own landscaping business prior to his quitting. With regard to the appointing authority's claim that he should not be entitled to any deductions for his "new truck," the appellant maintains that he did not purchase a truck for his business until after he was acquitted. Moreover, the

appellant maintains that he did not ask for any credits for a truck against the appointing authority.

CONCLUSION

N.J.A.C. 4A:2-2.10(d) provides that an award of back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. Benefits shall include vacation and sick leave credits and additional amounts expended by the employee to maintain health insurance coverage during the period of improper suspension or removal. *N.J.A.C.* 4A:2-2.10(d)1 provides that back pay shall not include items such as overtime pay and holiday premium pay. *N.J.A.C.* 4A:2-2.10(d)3 provides that the award of back pay shall be reduced by the amount of money which was actually earned or could have been earned during the period of separation from employment.

The record reflects that the appellant was indefinitely suspended from November 13, 2000 until his reinstatement on June 23, 2003. The parties agree that the appellant's annual salary was \$52,000 in 2000; \$56,000 in 2001; \$60,000 in 2002 and \$62,500 in 2003 and that there are 260 workdays per year. Therefore, from November 13, 2000 through December 31, 2000, the appellant missed 35 work days at a per diem rate of \$200, for a total of \$7,000. From January 1, 2003 until June 23, 2003, the appellant missed 123 workdays at a per diem rate of \$240.38, for a total of \$29,566.74.

During the appellant's separation from employment, he received the following: in 2000, he received \$2,042 from the Municipal Utilities Authority and \$90 from Goodfellas; in 2001, he received \$33,275 from Aramark and \$2,298 from Home Depot until he quit those positions, \$10 from the County, and \$9,734 from his landscaping business; in 2002, he received \$216 from the "recreation center" and \$20,245 from his landscaping business; and in 2003, he received \$662 from his landscaping business.

The appointing authority argues that since the appellant voluntarily quit his positions at Aramark and Home Depot, the wages he could have earned while still employed with those companies should be attributed to him for each of the relevant years, *i.e.*, \$42,032 for an entire year at Aramark and \$2,298 for his time spent at Home Depot. However, the Board does not find this argument persuasive. In this regard, the Board notes that the appellant initially indicates that he left his position with Aramark to start his own landscaping business. Later, the appellant indicates that he had already started his own business prior to leaving Aramark, but that he quit because he had problems with his supervisor. Moreover, it is noted that the appointing authority does not dispute the reasons for the appellant leaving

Aramark. Although he left one position, he was still earning an income through his own business. Accordingly, it would be inappropriate to penalize the appellant for leaving one position to continue working in another. Consequently, the appellant mitigated his back pay award through his self employment.

However, with regard to the appellant's landscaping business, the appointing authority argues that the gross income from his business should be utilized to mitigate back pay rather than his net income. Specifically, the appointing authority argues that it is unfair that the appellant first receives the benefit of his deductions, *i.e.*, truck costs, and then receives additional back pay because of the allowed deductions. Although the Board does not agree that the appellant's gross income should be utilized, it does find that it is appropriate that several of the appellant's allowable "tax deductions" be added back into his net income for mitigation purposes. Where as here, an appellant has started a personal business, several allowable tax deductions create a windfall to the appellant in the context of a back pay award. *See Carden v. Westinghouse Electric Corporation*, 850 F.2d 996 (3d Cir. 1988). For example, in the instant matter, depreciation is defined in the fifth edition of Black's Law Dictionary as the "write-off for *tax purposes* of the cost or other basis of a tangible asset over its estimated useful life" (emphasis added). Therefore, since depreciation is solely a tax benefit, it is unfair to allow an appellant to deduct that amount for mitigation purposes. Moreover, the Board finds that allowing the appellant to deduct his meals, entertainment, car/truck and travel expenses from his mitigation amount also creates a windfall. Regardless of whether the appellant was self-employed or employed by the appointing authority or another employer, he would still be responsible for payment of his meals, entertainment, car/truck and travel expenses. Additionally, it is noted that the appellant would be allowed to deduct such expenses, for income tax purposes, even if he was employed by the appointing authority³ or another employer. Consequently, he may also not deduct the amount of his meals, entertainment, car/truck and travel expenses for mitigation purposes. Therefore, the amount used for mitigation purposes for the appellant's income from his landscaping business is as follows: in 2001, \$9,734 (net income) plus \$5,925 (depreciation) plus \$444 (meals/entertainment) plus \$4,410 (car/truck) for a total of \$20,513; in 2002, \$20,245 (net income) plus \$5,538 (depreciation) plus \$741 (meals/entertainment) plus \$6,976 (car/truck) plus \$9 (travel) for a total of \$33,509; and in 2003, \$662 (net income) plus \$1,947 (depreciation) plus \$950 (meals/entertainment) plus \$3,481 (car/truck) for a total of \$7,040.

³ It is noted that a review of the appellant's 2000 tax returns reveal that he deducted his expenses for his "business related" auto and travel expenses, and meals and entertainment expenses.

Therefore, the calculation of the appellant's mitigated back pay award is as follows:

11/13/00 – 12/31/00	<u>Gross Amount Due</u> \$7,000 (<i>i.e.</i> , \$52,000 salary divided by 260 workdays equals \$200 per diem rate multiplied by 35 workdays) <u>Less Mitigation Amounts</u>
a. Municipal Utilities Authority	\$2,042
b. Goodfellas	\$90
<u>Mitigated Back Pay Award 2000</u>	\$4,868
2001	<u>Gross Amount Due</u> \$56,000 (<i>i.e.</i> , annual salary) <u>Less Mitigation Amounts</u>
c. Aramark	\$33,275
d. County	\$10
e. Home Depot	\$2,298
f. Self-employment	\$20,513 (<i>i.e.</i> , \$9,734 net income plus \$5,925 for depreciation plus \$444 for meals/entertainment plus \$4,410 for car/truck)
<u>Mitigated Back Pay Award 2001</u>	Zero (-\$96)
2002	<u>Gross Amount Due</u> \$60,000 (<i>i.e.</i> , annual salary) <u>Less Mitigation Amounts</u>
g. Recreation Center	\$216
h. Landscaping	\$33,509 (<i>i.e.</i> , \$20,245 net income plus \$5,538 for depreciation plus \$741 for meals/entertainment plus \$6,976 for car/truck plus \$9 for travel)
<u>Mitigated Back Pay Award 2002</u>	<u>\$26,275</u>

2003

Gross Amount Due

\$29,566.74 (*i.e.*, \$62,500 salary divided by 260 workdays equals \$240.38 per diem rate multiplied by 123 workdays)

Less Mitigation Amounts

i. Landscaping

\$7,040 (\$662 net income plus \$1,947 for depreciation plus \$950 for meals/entertainment plus \$3,481 for car/truck)

Mitigated Back Pay Award 2003

\$22,526.74

Total Mitigated Back Pay Award

\$53,669.74

Therefore, the appellant is only entitled to **\$53,669.74**. It is noted that *N.J.A.C.* 4A:2-2.10(d)1 expressly excludes items such as overtime pay and holiday premium pay from a back pay award. In addition, the amounts designated as the appellant's clothing allowance are similarly excluded from the amount of back pay. *See e.g., In the Matter of Shannon Stoneham-Gaetano and Maria Ciuffo* (MSB, decided April 24, 2001) (Because the purpose of a clothing allowance is to provide for the purchase and/or maintenance of uniform components, appellants were not entitled to the inclusion of such amounts in their back pay award for the periods they did not work, and thus, did not need to maintain their uniforms); *See also In the Matter of Judith Leeds* (MSB, decided May 19, 1998).

Moreover, the appellant is not entitled to counsel fees since Mr. Sheehy's services pertained to the criminal matter. The Board has neither the jurisdiction nor the authority to award counsel fees for matters brought in other forums. *See N.J.S.A.* 11A:2-22; *N.J.A.C.* 4A:2-2.12(f); *See also In the Matter of Rachel Ann Burris*, 338 *N.J. Super.* 493 (App. Div. 2001) and *Tooker v. Hartford Accident and Indemnity Co.*, 136 *N.J. Super.* 572, 578 (App. Div. 1975), *cert. denied*, 70 *N.J.* 137 (1976). Nor does the record indicate that the appointing authority unreasonably delayed making payment or that its actions were based on any improper motive. Rather, the appointing authority exercised its right to challenge the back pay award based on a legitimate disagreement regarding the actual amount of the entitlement. Thus, it is not appropriate for the Board to award counsel fees in this matter. *See e.g., In the Matter of William Carroll* (MSB, decided November 8, 2001).

It is noted that the record does not present any dispute as to the appellant's seniority and benefits. Therefore, the Board shall not discuss these entitlements.

ORDER

Therefore, it is ordered that appointing authority pay Mark Hingston the gross amount of \$53,669.74. It is further ordered that the appellant's request for counsel fees be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.